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October 21, 2002

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., S.W.  
Washington, DC 20554

Re: *Ex Parte* Presentation Regarding Unbundled Access to DSL Loops Traversing  
Digital Loop Carriers, CC Docket Nos. 96-98, 98-147, 01-318, 01-321, 01-337,  
01-338, 02-33

Dear Ms. Dortch:

Florida Digital Network, Inc. ("FDN"), a Florida-based competitive local exchange carrier, submits this *ex parte* letter to supplement the record evidence regarding the inability of competitive carriers to provide xDSL services on loops where incumbent LECs have deployed Digital Loop Carriers (DLCs). As the Commission is well aware, CLECs are unable to use their central-office-based equipment to provide DSL services over loops that pass through DLCs.<sup>1</sup> Without unbundled access to *all* the features and functions of these loops – including DSL multiplexing ("DSLAM") and related equipment deployed in ILEC remote terminals ("RTs") – in a manner that supports DSL transmission, CLECs are severely impaired in their ability to offer not only broadband services but other forms of telecommunications services as well. The evidence presented herein also shows that ILECs must continue to be classified as dominant in the provision of DSL transport services and, thus, undermines the ILECs' contention that such services should be exempted from Title II regulation.

The impairment CLECs face attempting to provide advanced services on ILEC DLC-based loops is demonstrated by the almost complete absence of CLEC-collocated DSLAM equipment in ILEC remote terminals ("RTs") anywhere in the country.<sup>2</sup> This is of particular

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<sup>1</sup> See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order*, 15 FCC Rcd. 3696 (1999) ("*UNE Remand Order*") ¶ 313.

<sup>2</sup> FDN is aware of only one completed CLEC RT collocation arrangement, demonstrating that CLECs cannot collocate DSLAMs at ILEC RTs on a commercial scale. See Proposed Order on Rehearing, *In the Matter of Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Services*, Illinois Commerce Commission, Docket No. 00-0393, (August

competitive significance in Florida, where 90 percent of end-user loops in BellSouth's service territory pass through DLCs.<sup>3</sup> As a consequence, there is no DSL competition in Florida, and elsewhere where DLC architecture is deployed on a large scale. BellSouth has deployed DSLAMs at over 3,000 of the 12,000 remote terminals in the state, giving it the capability to provide DSL to most end-users in its footprint. As a consequence, BellSouth controls approximately 99 percent of the DSL market in Florida, with *no prospect* for competition unless CLECs are given unbundled access to the unified loop.<sup>4</sup> Equally troubling, BellSouth's iron-clad grip on the DSL market poses a grave risk to the nascent competition currently found in the voice market. Because facilities-based CLECs such as FDN cannot offer DSL to their customers, and because BellSouth will only provide DSL on lines in which it is also the voice provider, end-users that want DSL must purchase *voice* service from BellSouth. As more and more customers want DSL, CLECs' inability to provide it poses a grave threat to their long-term survival. (BellSouth's anticompetitive tie of voice and DSL services is addressed in Part II, below.)

The essential facts documenting CLEC impairment on DLC loops has been before the Commission for nearly two years.<sup>5</sup> This letter attempts to minimize, to the extent possible, repeating the extensive evidentiary and other persuasive arguments in favor of xDSL loop unbundling set forth in these dockets by numerous commenters over the past two years. Rather, this focuses on certain highly pertinent facts (such as the extent of DLC deployment in BellSouth's region) that may have been insufficiently emphasized to date. These facts, in conjunction with the entire record, demonstrate that lack of unbundled access to these facilities significantly "impair[s] the ability of [CLECs] ... to provide the services that t[hey] seek[] to offer." 47 U.S.C. § 251(d)(2)(B).

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10, 2001) at 21-22 (documenting the year and \$133,000 spent by Sprint to collocate one DSLAM at one RT).

<sup>3</sup> See Memorandum from Div. Of Competitive Markets and Enforcement to Director, Div. Of the Commission Clerk, *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (Florida PSC Feb. 21, 2002) ("*FDN Arbitration Staff Recommendation*") at 20 (See Exhibit 1 (attached)). Although the Florida PSC's Final Order did not fully adopt the staff's recommendation, the staff's recommendation summarizes the evidence presented by the parties under oath, and is offered here in lieu of affidavits and other factual support.

<sup>4</sup> See, e.g., Final Order on Arbitration, *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (Florida PSC June 5, 2002) ("*FDN Arbitration Order*") at 14 (Exhibit 2); *FDN Arbitration Staff Recommendation* at 23.

<sup>5</sup> See, e.g., comments filed in response to the Commission's Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and *Sixth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98 (rel'd Jan. 19, 2001).

## **I. UNBUNDLED DLC LOOP ACCESS IS THE PRIMARY BROADBAND ISSUE IN FLORIDA, WHERE 90% OF BELL SOUTH'S LOOPS PASS THROUGH DLCs**

Unlike many parts of the country, where DLC deployments are in their relative infancy, BellSouth's network in Florida employs DLCs nearly exclusively. BellSouth has acknowledged that *approximately 90%* of its access lines in the state pass through DLCs.<sup>6</sup> BellSouth's nearly exclusive use of DLCs in Florida presents an extraordinarily different reality than that upon which the *UNE Remand Order* was premised. Just weeks before the Commission issued the *UNE Remand Order*, it observed that "[t]he use of DLCs varies by telephone company and typically ranges from almost zero to as much as 30 percent of the local loops within a given LEC's local network."<sup>7</sup> Because 90% of BellSouth's access lines utilize DLCs, rather than 0-30%, the question of DLC access in Florida is the most critical issue that will determine whether or not any competitive carriers will be able to provide more than a token level of broadband telecommunications services using the distribution facilities of the legacy public telephone network. Because CLECs are shut out of 90% of the potential market, they have attracted only a *de minimus* number of DSL subscribers in BellSouth's territory in Florida.<sup>8</sup> BellSouth, meanwhile, has been able to exploit unique advantages, as discussed below, in order to deploy DSL equipment at an ever-growing number of its DLCs, and now has amassed an estimated 350,000 DSL lines in the state.<sup>9</sup>

Prior to the promulgation of the *UNE Remand Order* in November 1999, BellSouth's DLC-based network architecture posed no impediment to facilities-based competition, because the Commission defined the local loop network element as "a *transmission facility* between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user

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<sup>6</sup> See *supra* note 3 and accompanying text. This network architecture is a function of the relatively recent population growth in Florida, and has been the dominant network architecture deployed in Florida and elsewhere in BellSouth's region since at least the early 1970s. The use of DLC is not, in itself, objectionable. Many UNE cost models, including the BellSouth Telecommunications Loop Model ("BSTLM"), approved by this Commission in the recent *Georgia/Louisiana 271 Order* assume DLC architecture in loops longer than 12,000 feet. It would be ironic, however, if the ILECs' use of efficient, forward-looking technologies effectively shut CLECs out of local markets.

<sup>7</sup> *Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279, 14 FCC Rcd 14712 (October 8, 1999) at ¶ 197 n.357.

<sup>8</sup> BellSouth admitted during the FDN arbitration that facilities-based CLECs served fewer than 1,000 customers in Florida. *FDN Arbitration Staff Recommendation* at 22. At the time, that was less than 1 percent market share. More recent statistics are unavailable.

<sup>9</sup> This figure is extrapolated. In April 2001, BellSouth admitted to having 133,015 wholesale and retail DSL customers in Florida. *Staff Recommendation* at 22. In December 2001, that figure stood at 227,714. BellSouth Answer to Interrogatory No. 54, *Investigation Into Pricing of Unbundled Network Elements (120 Day Filing)*, Florida Public Service Commission Docket No. 990649A-TP (Jan. 9, 2002). The 350,000 estimate is premised on similar growth and, as such, is probably conservative.

customer premises.”<sup>10</sup> This regulatory definition encompassed by implication any and all multiplexing equipment deployed in ILEC remote terminals. Indeed, if CLECs were denied unbundled access to the electronics deployed as a matter of course in the loop plant, they would be unable to provide voice services to their customers. Thus, when FDN was established in 1998, its founding was premised on its access to the ILECs’ entire loop, including all multiplexing and other electronics deployed in BellSouth’s DLC loop plant.

Unfortunately, the Commission changed the definition of the local loop in late 1999 when it promulgated the *UNE Remand Order*. The currently effective definition specifically *excludes* “those electronics used for the provision of advanced services such as Digital Subscriber Line Access Multiplexers.” 47 C.F.R. § 51.319(a)(1). The Commission’s rationale for excluding remotely deployed DSLAM equipment from ILEC unbundling obligations was founded on at least three distinct factual errors. First, the Commission erroneously found that remotely deployed DSLAMs perform a packet switching function. *UNE Remand Order* ¶¶ 303-04. In fact, DSLAMs perform no such function.<sup>11</sup> Second, the Commission incorrectly predicted the course of future competition.<sup>12</sup>

Third, and perhaps most importantly, the Commission failed to appreciate the difficulty of collocating DSLAMs in ILEC remote terminals. While the *UNE Remand Order* acknowledged the problem by establishing a “special” rule that requires ILEC unbundling “if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops necessary to offer the same level of quality ...,” *id.* ¶ 313, that “exception” has proved to be the rule. No CLEC has collocated DSLAM equipment at ILEC RTs on a commercial scale anywhere in the country.

The absence of CLEC RT collocations is not surprising. The one-time, non-recurring engineering and material costs associated with placing a single DSLAM in an ILEC RT can run from \$10,000 to \$15,000 depending on the deployment. *See* Table I, *infra*. Moreover, the collocation process would no doubt be time-consuming. Central office collocations, where there usually are few, if any, zoning, space or environmental considerations to contend with, frequently take a year to implement. Similar time intervals for wide-spread RT collocations, where such obstacles would occur routinely, would, obviously, constitute a significant impairment. RT collocation also assumes that CLECs will always be able to obtain electric power and dark fiber transport to feed its DSL transmission from its collocated remote terminal DSLAM to the central office. (It goes without saying that a CLEC would clearly be impaired if its only option were to construct its own, new feeder distribution network by obtaining rights-of-way and construct new fiber facilities between BellSouth’s remote terminals and central offices.) Finally, this engineering process would have to be replicated for *each* RT in which a CLEC seeks to collocate. Given the 12,000 RTs in BellSouth’s Florida network, this would be a

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<sup>10</sup> 47 C.F.R. § 51.319(a) (1996). *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (“*First Local Competition Order*”) App. B-20.

<sup>11</sup> *See, e.g., Triennial Review Opening Comments of AT&T Corp.* at 182-84 (April 5, 2002).

<sup>12</sup> *See UNE Remand Order* ¶¶ 306-08.

daunting and expensive project for any CLEC to undertake, especially given the capital markets that have prevailed for the last three years.

Assuming for present purposes that these logistical challenges could be overcome (an unreasonable assumption), CLEC collocation could still never be cost effective, as the following analysis demonstrates.

Table I  
Piece-Part Costs of a CLEC-Assembled DSL-Capable Loop

<u>Item</u>	<u>Monthly Recurring Cost</u>	<u>Non-Recurring Cost</u>
OSS Inquiry*	--	\$75.00
RT Space Availability Report*	--	\$232.00
Application Fee*	--	\$616.00
DSLAM & Installation**	--	\$10,000.00
Rent and Power for collocation*	\$233.00	--
Zone II Sub-Loop Feeder <sup>†</sup>	\$61.00	\$643.00
Zone II Sub-Loop Distribution	\$15.00	\$45.00
Inter-office transport*	\$71.00	\$643.00
Security Access**	--	\$26.00
<b>Totals</b>	<b>\$380.00</b>	<b>\$12,280.00</b>

\*Source: BellSouth discovery in arbitration proceeding.

\*\*Source: Private vendor inquiries.

<sup>†</sup>Source: Currently prevailing UNE rates in Florida.<sup>13</sup>

The above analysis assumes that CLECs will have to purchase and pay for the installation of their own dedicated DSLAMs (estimated conservatively at \$10,000),<sup>14</sup> as well as purchase each component of the DLC loop necessary to provide service, including the sub-loop distribution and feeder elements, as well as inter-office transport from the wire center to FDN's packet switch. Other costs captured above include OSS inquiry reports (to determine the address of an RT and the customers that it serves); space availability inquiry and collocation application fees, as well as security. Given that neither FDN nor any other CLEC has ever attempted to assemble its own loops in this manner, there may well be other costs that FDN's chart has failed to anticipate.

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<sup>13</sup> Final Order on Rates For Unbundled Network Elements Provided by BellSouth Telecommunications Inc., *Investigation Into Pricing of Unbundled Network Elements (120 Day Filing)*, Florida Public Service Commission Docket No. 990649A-TP, Order No. PSC-02-1311-FOF-TP (September 27, 2002) ("*120 Day Order*") at Appendix A (establishing recurring rates); *see also* Order No. PSC-01-1181-FOF-TP (May 25, 2001) in the same docket (establishing non-recurring rates). This analysis prices all network elements at Zone II rates because the Florida Commission's zone allocation scheme places one-half of all wire centers in Zone II. Fewer than 20 percent of all wire centers are allocated to the "low cost" Zone I.

<sup>14</sup> *See FDN Arbitration Staff Rec.* at 27.

And that is not all. Other costs associated with providing the “finished” information service consumers associate with ISPs, such as ATM transport, Internet access, e-mail, data storage and other data services, and general operating expenses, would amount to an estimated \$10 per customer. Various selling, general, and administrative (SG&A) expenses amount to another 30 percent of all revenues. When these costs are compared to the price at which FDN could offer services to its customers, it becomes plain that FDN could *never* compete if it had to assemble its own DSL-capable loops on an RT-by-RT basis. This is made plain by the following “business case” analysis:

Table II  
“Business Case” Assumptions For DSLAM RT Collocation

<u>Cost Factor</u>	
1. FDN retail price for “finished” ADSL-based information service	\$49.00
2. <u>Number of customers per RT DSLAM</u>	<u>12.00</u>
3. Potential revenue per RT DSLAM (row 1 x 2)	<b>\$588.00</b>
4. Monthly recurring cost (from Table I)	\$380.00
5. Cost of ISP service (\$7 per customer)	\$84.00
6. FDN Operating Costs (\$3 per customer)	\$36.00
7. <u>SGA Costs (30% of revenues)</u>	<u>\$204.00</u>
8. <u>Costs per Collocated DSLAM (row 4+5+6+7)</u>	<b><u>\$704.00</u></b>
9. EBITDA Margin per collocated DSLAM (row 3-8)	<b>- \$116.00</b>

This simple but realistic analysis demonstrates why CLECs can never compete via the RT collocation strategy that the ILECs advocate. BellSouth currently offers small businesses DSL-based information services at \$49 per month.<sup>15</sup> Assume, first, that FDN could compete by matching this price – an unreasonable assumption since FDN usually wins customers by offering lower prices or better (and thereby more expensive services). Assume, second, that FDN collocates a 16-port DSLAM and achieves a 75 percent utilization of that equipment, *e.g.*, 12 customers per collocated DSLAM. Based on these assumptions, FDN stands to obtain monthly revenues of \$588 per collocated DSLAM. As the chart demonstrates, however, these “revenues” would not be sufficient to recover even 85 percent of FDN’s operating costs of \$704 per month, let alone the non-recurring installation costs (estimated at over \$12,000) documented in Table I.

In its interconnection arbitration with BellSouth before the Florida Public Service Commission, FDN presented this analysis, as well as voluminous testimony documenting the operational impairments alluded to above. In its Recommendation to the full Commission, the Florida PSC’s staff agreed with FDN that CLECs are impaired without unbundled access to the entire loop (including DSLAM equipment deployed in remote terminals). “The most compelling evidence presented in this proceeding,” the Staff concluded, “revolves around the state of competition in the Florida DSL market, and how that relates to the network architecture deployed by BellSouth.”<sup>16</sup> After reviewing the lack of CLEC market penetration (less than one

<sup>15</sup> See <http://www.fastaccess.com/content/index.jsp> (visited October 13, 2002).

<sup>16</sup> *FDN Arbitration Staff Rec.* at 22.

percent market share) and the evidence FDN presented documenting the impossibility of collocating in ILEC RTs, *id.* at 22-40, the staff reached the following conclusions:

Staff has taken into consideration the totality of circumstances, including but not limited to: quality and ubiquity of all copper facilities; the cost and ubiquity of self-provisioning; the current state of competition in the DSL market; and the prospect of rapid introduction of competition into the market from utilizing a broadband UNE. Although the FCC did not attach any weight to specific factors when determining if a carrier's ability to provide a service is impaired without access to the unbundled element, staff believes the cost of collocating DSLAMs in remote terminals is particularly compelling. Staff believes the cost of collocating DSLAMs in BellSouth remote terminals, when taking into account the extensive deployment of RTs in BellSouth's network, impairs FDN's ability to provide DSL service on a ubiquitous basis to the residential and small to medium sized businesses that FDN targets in its service area.

Accordingly, taking the sum of the effect of the above factors into consideration, staff believes the creation of a broadband UNE is warranted for the purposes of the new FDN/BellSouth interconnection agreement. Therefore, staff recommends that where BellSouth has deployed a DSLAM in a remote terminal for the purposes of providing DSL service to customers served by that remote terminal, BellSouth should be required to provide a broadband UNE that includes unbundled DSL-capable transmission facilities between the customer's Network Interface Device and BellSouth's central office, including attached electronics that perform DSL multiplexing and splitting functionalities in the remote terminal.

*Id.* at 40-41.

In its Final Order on the merits, the FPSC declined to adopt the Staff's recommendation. The FPSC declined to do so because it was concerned about discouraging BellSouth's investment incentive and because it found that "the costs to install a DSLAM are similar for both BellSouth and FDN."<sup>17</sup> Though this is not the appropriate forum to dissect the Commission's Order, neither rationale cited by the Commission withstands scrutiny.

First, as to the "investment discouragement" argument, BellSouth began deploying DSLAMs in its remote terminals in 1998, well *before* this Commission's *UNE Remand Order* exempted these facilities from unbundling. Thus, BellSouth cannot claim that its DSLAM deployment program was premised on the assumption that it would have proprietary access to these facilities.

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<sup>17</sup> Final Order on Arbitration, *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (Florida PSC June 5, 2002) at 16.

Second, the Commission's reliance on the comparison between FDN's and BellSouth's costs misses the point.<sup>18</sup> In a greenfield, CLECs *might* be able to dig up the streets and lay fiber at a similar cost as the ILECs. But the United States is not a greenfield. CLECs cannot build duplicative facilities to all end-users, and the Act is predicated upon the notion that they should not be forced to do so. The Florida PSC's logic would essentially require CLECs to duplicate the ILECs' last-mile network. It should not be surprising that CLECs cannot economically do so. Moreover, nothing in the Act, its legislative history, nor in any Commission order assumes that competitors will replicate the ILECs' in-place, last-mile network. Indeed, the whole point of network element unbundling and TELRIC pricing is that it permits carriers to take advantage of the ILECs' economies of scale.<sup>19</sup> That is why a UNE voice loop that happens to travel over DLC facilities costs only \$15, but jumps to \$76 if a CLEC is forced to purchase the dedicated components of the loop separately, denying the CLECs the opportunity to share in the economies of scale of ILEC deployed DSLAM and feeder facilities. See Table I, *supra*. That the price of the *shared* facility is lower is not evidence that it is confiscatory, but rather reflects ILEC efficiencies, which ILECs are required under the Act and the FCC's Rules to share with CLECs.

Moreover, the argument that CLECs can deploy DSL capability at RTs just as easily as the ILECs, while perhaps superficially appealing, is simply not true. ILECs have numerous advantages, arising from the fact that their deployment of DSL capability at RTs is simply a modification of the existing network, and does not represent a new or separate network. BellSouth's DSL lines utilize preexisting copper subloops, remote terminals, rights-of-way, copper or fiber feeders, and other legacy facilities that are part of BellSouth's traditional telecommunications network largely built and paid for during its monopoly era. Thus, even to the extent that the Commission considers the adoption of special rules governing "new" ILEC investments, the ILECs' deployment of DSL equipment within their existing distribution network simply does not qualify for any such classification because its viability is dependent upon the use of existing investments. It would be a more interesting exercise to evaluate ILEC broadband deployments that were truly new because they were constructed outside of the ILEC's traditional incumbent territory; the fact that none have undertaken this effort only serves to illustrate the relative difficulties of broadband deployment between the incumbent carrier and all others. FDN is not seeking to free-ride on the risks and investments of BellSouth; it has invested millions of dollars in its own state-of-the-art switching facilities in order to deliver the highest quality of service to its customers. However, in the unique case of DSL over DLC loops, the use of ILEC loops and DSLAM or comparable equipment is in almost all cases the only realistic opportunity for competitive access.

Finally, collocation of DSLAMs at remote terminals will become even less competitively viable as BellSouth escalates its deployment of Next Generation Digital Loop Carrier ("NGDLC") systems at its remote terminals, which use digital line cards that are smaller and

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<sup>18</sup> The FPSC's cost comparison is also wrong. The FPSC's analysis failed to include many relevant costs that FDN incurs but that BellSouth does not. Under the approach envisioned by the Commission, where CLECs are denied unbundled access to ILEC facilities, CLECs must, for example, purchase dedicated transport facilities, while the ILECs can use facilities the cost of which can be allocated to other users, such as voice customers.

<sup>19</sup> *First Local Competition Order* ¶ 679.



significantly less expensive than DSLAMs.<sup>20</sup> BellSouth has opposed CLEC collocation of line cards at its NGDLCs, thereby denying the ability of CLECs to place DSLAM functionality at the remote terminal on the same terms and conditions that it affords to its own operations. Thus, even in the rare instances in which remote terminal DSLAM collocation might be marginally viable, that viability would be destroyed by the comparative disadvantage of competing against BellSouth's less expensive NGDLC system.

## **II. BELLSOUTH'S MONOPOLIZATION OF DSL IN FLORIDA ALSO IMPAIRS FDN's ABILITY TO OFFER SERVICES IN THE VOICE MARKET**

As customers look increasingly for integrated service providers, FDN's inability to offer high-speed data services increasingly undermines its ability to compete in voice markets as well. And BellSouth's aggressively anticompetitive business tactics exacerbate the problem. For not only is FDN unable to provide DSL itself, BellSouth flatly refuses to sell *its* DSL services to any consumer who purchases voice services from a CLEC.<sup>21</sup> Similarly, BellSouth prohibits the ISPs who obtain wholesale DSL service from BellSouth from using that service to serve non-BellSouth voice customers. In other words, BellSouth offers DSL service only on lines where BellSouth is providing voice services.<sup>22</sup> And where BellSouth provides DSL service to a customer who switches its voice service provider to a CLEC, BellSouth will, without notice, disconnect the DSL service even though BellSouth easily has the capability to continue to provide data service on the line.<sup>23</sup> Given the initial hardships suffered by the customer in having

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<sup>20</sup> BellSouth has acknowledged that the provision of DSL service using these NGDLC systems is approximately 10% less expensive than the use of remote terminal DSLAMs. *See Investigation Into Pricing Of Unbundled Network Elements (BellSouth Track)*, Docket No. 990649A-TP, Hearing Transcript (Fla. P.S.C. March 12, 2002) at 512 (BellSouth witness Mr. Williams testifying).

<sup>21</sup> As here, "BellSouth DSL" refers to any DSL-based information service where BellSouth is the underlying provider of the DSL transmission, and includes the situation in which an unaffiliated ISP, such as Earthlink or AOL, has the direct business relationship with the end-user and purchases the underlying DSL transmission from BellSouth out of BellSouth's tariff. Of course, BellSouth also has its own BellSouth-branded DSL-based information service offering, known as "FastAccess."

<sup>22</sup> BellSouth also offers DSL on lines where a CLEC is providing voice service by reselling BellSouth service. This additional option, which reflects a minimalist interpretation of the Connecticut 271 Order, is of no practical use to FDN because resale is not a viable long-term strategy in Florida. In the *Connecticut 271 Order*, the Commission found that BellSouth was required to allow a competitive LEC to resell DSL service over lines on which the competitive LEC resells Verizon's voice service. *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, Memorandum Opinion and Order, CC Docket No. 01-100, (July 20, 2001), at ¶ 28. The Commission has, however, not addressed the fact that ILECs unreasonably refuse to provide DSL service to customers purchasing CLEC voice service over UNE-P or UNE loops.

<sup>23</sup> Though the Florida Commission ordered BellSouth to refrain from this practice, BellSouth has indicated that it has no intention of complying and will appeal and delay implementation of the Commission's order for as long as it can, just as it has obstructed every other attempt for CLECs to gain a toe hold in the local markets. *See Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP, (Fla. P.S.C. June 5, 2002), at 4-11

a DSL line installed, the customer is likely to lose interest in obtaining voice telephone services from FDN, even when FDN is able to offer superior pricing and service for voice services. BellSouth's bottleneck control over DSL-capable loops therefore casts an anticompetitive shadow over the entire Florida telecommunications market.

Just as perniciously, BellSouth refuses to provision *new* DSL service to *current* CLEC voice customers. Thus, as FDN's existing customer base requests DSL service (and more and more do everyday), FDN cannot meet that demand. And because BellSouth will not provide its own service on FDN's lines, FDN's voice customers are unable to get any DSL service so long as they take voice service from FDN. FDN has lost numerous voice customers to BellSouth as a result of BellSouth's refusal to provide DSL to customers whose voice service is provided by FDN.

There is no technical or legal justification for BellSouth's refusal to provide DSL on the same line that CLECs provide voice. Thus, BellSouth's policy can only be understood as an anticompetitive exertion of its monopoly power in the DSL market into the distinct voice market.<sup>24</sup> Of course, BellSouth still has monopoly power in the voice market, but CLECs can at least still *nominally* compete for voice customers. Because of the nature of BellSouth's network architecture in Florida and the Commission's restrictive unbundling rules, however, CLECs cannot similarly provide DSL. If CLECs cannot offer their customers the same range of services as the incumbent providers, the result will be the inevitable demise of competitive LECs.

The Florida PSC recently ordered BellSouth to refrain from "disconnecting customers' FastAccess Internet Service when they switch to FDN voice service."<sup>25</sup> The PSC found that BellSouth's refusal to provide DSL to FDN voice customers "raises a competitive barrier in the voice market for carriers that are unable to provide DSL service ... and "unduly prejudices or penalizes those customers who switch their voice service." Despite the promise represented by this Order, BellSouth has indicated that it has no intention of complying and will appeal and delay implementation of the Commission's order for as long as it can, just as it has obstructed every other attempt for CLECs to gain a toe hold in the local markets.<sup>26</sup> Moreover, the Order

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<sup>24</sup> Product ties of this sort are considered *per se* violations of the antitrust laws. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).

<sup>25</sup> *FDN Final Arbitration Order* at 8.

<sup>26</sup> BellSouth has filed motions to reconsider, challenging the order both on the merits as well as the Commission's jurisdictional authority. An indication of the approach BellSouth will inevitably take can be found in the § 252(e)(6) appeal it has filed challenging the Florida PSC's *Supra* Telecommunications, Inc. arbitration award which, after the FDN arbitration, requested similar DSL relief as had been granted FDN. The Commission approved interconnection language proposed by *Supra*, and BellSouth promptly appealed. See *BellSouth Telecom., Inc. v. Supra Telecom., Inc. et al.*, Civil Action No. 4:02cv325-RH/WC (U.S. District Court Northern District of Florida) at, e.g., ¶ 7 ("The FPSC's decision compelling BellSouth to provide DSL-Based High Speed Internet Access Service to *Supra*'s customers receiving voice service over UNE lines violates the 1996 Act and numerous FCC decisions implementing the Act, is beyond the FPSC's authority, and is preempted by federal law and applicable FCC decisions.") (Attached as Exh. 4.) Though BellSouth is wrong on all counts, and FDN is confident of prevailing when BellSouth eventually (and inevitably) appeals its award, BellSouth's approach to litigating this issue demonstrates why immediate relief from this Commission is necessary.

does not require BellSouth to provision new DSL service to existing FDN customers. The Commission must eliminate the unbundling restrictions it adopted in the *UNE Remand Order* and it must prevent the incumbent LECs from engaging in anticompetitive product ties.

### **III. COMPETITION FROM CABLE BROADBAND SERVICES IS NEARLY NONEXISTENT IN THE BUSINESS MARKET**

The ILEC arguments for exemption of broadband facilities from the unbundling obligations of Section 251(c) rely heavily on alleged competition from cable modem operators. At least in the market for small and medium sized businesses, this argument is completely misplaced, as *almost none* of FDN's prospective business customers are able to purchase high-speed data services from cable operators, and FDN is not able to lease or otherwise make use of cable facilities in order to provide telecommunications services to these consumers.

In evaluating the extent of the so-called inter-modal competition cited by the RBOCs, the Commission must define the relevant markets carefully so as to delineate between business and residential consumers. The so-called "Fact Report" offered in this proceeding by the RBOCs to illustrate broadband competition from cable did not even include data on cable penetration in the business market. BellSouth submitted into the record of its arbitration with FDN a study by the Precursor Group that showed that cable modem service is obtained by *less than 1%* of small and medium sized businesses, a group which represents 85% of all U.S. business firms.<sup>27</sup> All of the other studies with which FDN is familiar confirm these conclusions.<sup>28</sup>

Small and medium sized businesses are the core of FDN's business strategy, and the Precursor study found that of all customer types, these firms "need broadband most,"<sup>29</sup> Presumably because larger businesses can justify the purchase of T-1 and other methods of obtaining high-speed access to data. In Florida, BellSouth DSL is the only viable broadband option for most of these companies, who must therefore also obtain their voice services from BellSouth if they purchase DSL. Even in the residential market, millions of consumers do not have a choice between DSL and cable. According to the California Public Utilities Commission, only 15% of Californians have a choice between DSL and cable,<sup>30</sup> and 45% of consumers in SBC territory who have access to DSL or cable broadband have DSL as their only wireline broadband choice.<sup>31</sup> The Precursor Study cited by BellSouth indicates that in the foreseeable future, cable modem providers are unlikely to deploy broadband access to approximately 25% of their total residential footprint.<sup>32</sup> Therefore, even once ongoing deployment phases are complete,

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<sup>27</sup> A copy of the Precursor Report relied upon BellSouth is attached hereto as Exhibit 3.

<sup>28</sup> See, e.g., Comments of AT&T, In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337 (filed March 1, 2002)

<sup>29</sup> Precursor Report at 1.

<sup>30</sup> See Communications Daily, Vol. 22, No. 100 at 5 (May 23, 2002).

<sup>31</sup> California Public Utilities Commission Comments at 1.

<sup>32</sup> Precursor Report at 1.

millions of consumers still will not be able to purchase cable modem services.<sup>33</sup> Because the ILECs and cable operators often operate in separate parts of a market, the competition between them is muted and customers are often left with monopoly service and pricing. There is no evidence that the “competition” between these two historical incumbents has generated or will generate the innovation and lower prices envisioned by Congress in adopting the 1996 Act, and the Commission previously rejected the significance of this so-called “inter-modal” competition in the *UNE Remand Order* (§ 189). Thus, the Commission cannot reasonably infer that Congress, in adopting the landmark Telecommunications Act of 1996, would have been satisfied with the limited broadband competition that presently exists between the two incumbent providers already on the scene at the inception of the Act.

Even if everything the RBOCs say about the competition presented by cable providers is true (which it is not), the state of competition in the broadband services market is, at best, a duopoly. Restricting unbundling and the other limitations proposed by the ILECs would only strengthen that duopoly, the benefits of which would inure chiefly to those duopolists, not U.S. consumers. In his recent Statement explaining his vote against the DirecTV-Echostar merger, Chairman Powell explained that a duopoly market cannot be expected to bring the benefits of unfettered competition to consumers:

At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.<sup>34</sup>

Accordingly, there is no justification for abandoning the market-opening provisions of Section 251 of the Act, even where cable broadband and DSL are both available to residential subscribers in the same market.

**V. CLASSIFICATION OF RETAIL BROADBAND INTERNET ACCESS SERVICES AS TITLE I “INFORMATION SERVICES” WOULD NOT ALTER THE STATUS OF WHOLESALE BROADBAND *TRANSMISSION* SERVICES AS TELECOMMUNICATIONS SERVICES SUBJECT TO TITLE II.**

In the *Wireline Broadband* proceeding, the Commission is considering whether to classify bundled broadband services that include Internet access or other enhanced, interactive services as an information service subject only to Title I regulation. Such a conclusion, by itself,

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<sup>33</sup> According to the California Public Utilities Commission, only 15% of Californians have a choice between DSL and cable, and 45% of consumers in SBC territory who have access to wireline broadband have DSL as their only wireline broadband choice. See FCC Broadband Docket, Comments of the California Public Utilities Commission; see also Communications Daily, Vol. 22, No. 100 at 5 (May 23, 2002) (describing Congressional testimony of California PUC Chairman Lynch).

<sup>34</sup> Statement of Chairman Michael K. Powell, Application of EchoStar Communications Corporation (EchoStar); General Motors Corporation and Hughes Electronics Corporation (DirecTV) (Oct. 10, 2002).

should not have a significant impact on the existing regulatory scheme of the 1996 Act, as these services have been regulated as information, rather than telecommunications, services for several years. However, the ILECs have distorted both law and fact to attempt to paint such a *status quo* finding as a landmark change in policy that would necessitate changes to the Commission's interpretation of Section 251 of the Act. The ILECs argue that classification of these services as information services would exempt the *facilities* used to provide them from unbundling. On the contrary, regardless of the Commission's definition of retail, high-speed Internet access services, the ILECs would remain obligated under the terms of Section 251(c)(3) to provide network elements that a CLEC wished to use obtain so that it could provide broadband transport services, which can only be defined as a telecommunications service under the Act.

The argument that network elements used to provide information services should be exempt from unbundling relies on what the Commission has previously labeled in the *Computer Inquiries* as the "contamination doctrine." However, the Commission has previously determined that this doctrine cannot be relied upon by an ILEC to evade its obligations under the Act, finding that "application of the contamination doctrine to the BOCs would result in 'an improper policy result.'"<sup>35</sup> The Commission reasoned that:

"application of the contamination theory to a facilities-based carrier . . . would allow circumvention of the Computer II and Computer III basic-enhanced framework . . . [and enable the carrier] to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result."<sup>36</sup>

Application of the contamination doctrine would lead to similar undesirable results in the DSL market. Relaxed regulation over independent ISPs does not have adverse consequences for consumers or competition because the Commission retains jurisdiction over the underlying common carrier services. By contrast, deregulation of the common carriers themselves could be expected to unleash anticompetitive pressures that would limit, or even eliminate, competition. We see this on the ground in Florida. Relieved of its obligation to provide full unbundled access to the local loop, BellSouth, as explained above, is exercising its control of local loop facilities to stamp out competition in both the voice and data services markets. Unlike non-carrier enhanced service providers, carriers engaged vertically in the enhanced services market have the power to restrain market forces by favoring their own enhanced services over those of competitors.<sup>37</sup> Where a carrier such as BellSouth possess monopoly or near-monopoly power in the provision of last-mile access, its ability to suppress competition for enhanced services grows enormously. It

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<sup>35</sup> *Independent Data Communications Manufacturers Association, Inc. and American Telephone and Telegraph Co. Petition for Declaratory Ruling That All IXC's be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, at n. 73 (1995) (citing Computer III Notice, FCC 85-397, ¶ 32 (1985)).

<sup>36</sup> *Id.* at ¶ 44.

<sup>37</sup> See, e.g., Comments of DirecTV Broadband, Inc., *Application by SBC Communications, Inc., et al. for Provision of In-Region, InterLATA Services in California*, WC Docket No. 02-306 (Oct. 9, 2002) at 4-7 (documenting the price squeeze created by SBC's tariffed pricing of wholesale DSL transmission and the retail price charged by SBC's ISP affiliates providing broadband Internet access).

would be bitterly ironic if the Commission's policy designed to protect ISPs from the burdens of regulation were used by the most regulated of carriers to suppress, and ultimately destroy, competition in the very market the policy was designed to foster.

BellSouth's ability to suppress DSL competition through its anticompetitive tactics is much more than hypothetical. While ILEC ISP affiliates have traditionally held a single-digit percentage of the dial-up ISP market, they have leveraged their control of bottleneck facilities to amass approximately a 99 percent share of the DSL-based Internet services market. Meanwhile, CLEC facilities-based entry strategies have been frustrated by restrictive unbundling rules. Not coincidentally, as competition from facilities-based CLECs has diminished, ILECs have been imposing new rates and terms on their wholesale DSL services that threaten to force their unaffiliated ISP "partners" from the market. Unless other alternatives emerge, once broadband replaces dial-up as the primary means of Internet access, the ILECs will totally dominate not only DSL delivery but the ISP market as well.

## **VI. SOME COMMENTERS HAVE EMPLOYED UNDULY NARROW TERMINOLOGY IN DESCRIBING DLC LOOPS**

The DSL-capable DLC loop should be defined broadly in order to fulfill the intention to make such loops available to CLECs over a variety of network architectures and changing technologies. In particular, FDN stresses two instances in which some commenters have used unduly narrow terminology. First, the Commission should not limit its definition to fiber-fed DLC loops. In Florida alone, while 90 percent of the loop plant utilizes a DLC-based architecture, almost 20 percent, or approximately 1.2 million of BellSouth's DLC loops, are connected at the DLC to *copper* feeders, rather than fiber.<sup>38</sup> For purposes of DSL services, these aggregated copper feeders are no different from fiber feeders; the DSL traffic still must be multiplexed at the remote terminal. The Commission should, therefore, refrain from using any terminology that is not dependent upon a particular type of feeder or other infrastructure.

Second, any regulations should apply to all DLC architectures. Some commenters have focused only on so-called Next-Generation Digital Loop Carriers ("NGDLCs"). However, Carriers cannot provision DSL over any DLC loops, next generation or otherwise. Therefore, any unbundling or other obligations related to DSL should apply to any DLC or similar architecture where the ILEC has deployed any equipment or technology to provision DSL or other broadband services.

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<sup>38</sup> *FDN Arbitration Staff Rec.* at 23.

## CONCLUSION

To FDN's knowledge, the extent of DLC deployment in BellSouth's region is not currently in the record, nor is information on the impact this network architecture is having on competition. And, of course, the competitive issues posed by this network design go well beyond Florida and BellSouth's region. CLECs stand no chance of competing on an equal footing with the ILECs unless they are provided with full, unbundled access to the local loop, regardless of the electronics found there, and the incremental upgrades to those facilities performed from time to time by the ILECs. This was true in 1996 and it remains true today. The future of local telecommunications competition depends on the Commission's continued recognition of this fundamental principle.

Respectfully submitted,

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